IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DARRYL ASHMORE,

Plaintiff,

vs.

NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN,

Defendant.

Case No. 9:16-cv-81710-KAM

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Court should deny Ashmore's motion for summary judgment. Ashmore does not dispute that Plan staff told him the Atlanta neutral examinations would go forward as scheduled and, after receiving that information, Ashmore never notified anyone that he was *unable* to attend those Atlanta examinations. That concession is fatal. The Plan states that a Player's application "***will be denied***" if he fails to give two days' advance notice that he is "***unable***" to attend a scheduled examination.[1] This unambiguous statement is binding on the Plan and its Board under federal law.

The Court should also reject Ashmore's motion because, even if the Board wrongfully denied his application (and it did not), ERISA jurisprudence makes it clear that Ashmore still is not entitled to judgment in his favor. In that event, the Court should remand this case to the Plan. The Plan gives ***the Board*** discretionary authority to review claims and determine claims for benefits. Thus, ***the Board***, not the Court, should review the record evidence to determine whether Ashmore qualifies for benefits under the terms of the Plan. Ashmore's claim turns on (1) evidence that was, as Ashmore acknowledges, never evaluated by or, in some cases, never presented to the Board, and (2) Ashmore has represented that he is ready and willing to attend any required Plan neutral evaluations.[2] Remand would allow the Board to fully and fairly review the medical evidence, as ERISA contemplates; it would hold Ashmore to his stated commitment to attend the required Plan neutral evaluations; and it would give the Board crucial evidence so

[1] Plan Doc. § 3.2(c) (012) (emphasis added).

[2] The Plan will move the Court to strike evidence that was not part of the administrative record before the Board. *See* Blankenship v. Metro. Life Ins. Co., 644 F.3d 1350, 1354 (11th Cir. 2011) ("Review of the plan administrator's denial of benefits is limited to consideration of the material available to the administrator at the time it made its decision.").

far denied it due to Ashmore's repeated failure to attend.

For these reasons, as explained more fully herein, the Court should deny Ashmore's motion and either grant the Plan's competing Motion for Judgment on the Administrative Record (ECF 39) or remand this case to the Plan for further administrative proceedings.

ARGUMENT & AUTHORITIES

I. Ashmore Does Not Genuinely Dispute The Fact That He Did Not Provide Advance Notice That He Was Unable To Attend The Atlanta Examinations.

The Board is required by federal law to enforce the terms of the Plan.[3] Ashmore barely mentions the Plan provision at the center of this case, and he never grasps what that provision means to his claim for benefits.

Plan Section 3.2(c) states that "[i]f a Player fails to attend a scheduled examination, his application for T&P benefits **will be denied**, unless the Player provided at least two business days advance notice to the Plan Office that he was **unable** to attend."[4] In other words, when an examination is scheduled, a Player ***has*** to show up. He cannot sit back and try to repeatedly negotiate the terms of whether he will or will not attend.

This case begins and ends with Plan Section 3.2(c) because, after being told the Atlanta examinations would go forward as scheduled, Ashmore concedes he never informed anyone that he was unable to attend those examinations. Ashmore decided not to attend, believing he did not have to attend the examinations at the mere say-so of Plan staff,[5] and when he did the Committee

[3] *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, -- U.S. --, 134 S. Ct. 604, 612 (2013) ("And once a plan is established, the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument.' This focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'") (citations omitted).

[4] Plan Doc. § 3.2(c) (012) (emphasis added).

[5] *See* Pl.'s Mot. for Sum. Jgmt. ("Pl.'s Mot.," ECF 40) at 6, ¶¶ 25-26 (admitting that, after being told that the Atlanta

and the Board then had no choice but to deny his application for benefits. Ashmore failed to comply with the express requirements of Plan Section 3.2(c).

II. Ashmore's Arguments Do Not Show That The Board Wrongly Or Unreasonably Denied His Application.

A. This case is not about a lack of "accommodations."

Most of Ashmore's motion is devoted to explaining his version of events. It begins with the claim that Ashmore needed travel "accommodations," it notes that the Plan admitted that it can grant such requests,[6] and it argues that Ashmore "did everything right in asking for reasonable travel accommodations."[7] These arguments totally miss the point because they ignore the binding nature of Plan Section 3.2(c). Once Ashmore was told that the examinations would not be rescheduled, he ***had*** to attend them, and he did not.

The Plan is a unique, collectively-bargained disability plan that serves a critical role by distributing millions of dollars in disability benefits to Players each month. The undertaking is massive.

Each year, Plan staff process hundreds of disability applications, which in turn require them to schedule over one thousand neutral examinations. They do this under almost impossibly strict deadlines set by the Department of Labor ("DOL"). DOL claim regulations generally allow only 45 days to (1) review an application for completeness, (2) determine what neutral

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examinations could not be rescheduled, Ashmore disregarded the instruction, stated that he did not have attend examinations at the mere say-so of Plan staff, and asked that his request for "accommodations" be presented to the Committee for a determination); *id*. at 16 (same). *See also* 10/28/2015 E-Mail fr. E. Richard to E. Dabdoub (410); 10/28/2015 E-Mail fr. E. Dabdoub to E. Richard (409).

[6] Pl.'s Mot. at 15. In making this argument, Ashmore notes that he initially claimed he could not travel by plane at all, citing a letter to that effect by Dr. Frank Conidi. *Id*. Ashmore's attorney knows that representation is false, and advancing it at this stage is reprehensible, if not sanctionable.

[7] Pl.'s Mot. at 16. *See id*. at 17 (arguing that Ashmore "did everything necessary to properly request accommodations").

examinations may be appropriate, (3) schedule those examinations, (4) inform the Player of the dates, (5) check up to make sure the Player attended, (6) receive the report(s) of the neutral physician(s), and (7) review the report(s) with all other materials in the record, including whatever materials the Player chooses to submit, and decide the claim.[8] The Department of Labor monitors the Plan's compliance with this rule.

Obviously, given the volume of applications and the accompanying number of neutral examinations that must take place, the Plan faces a huge logistical challenge. Ashmore himself was scheduled to see three neutral physicians to ensure that all of the impairments he listed in his application were fully evaluated. Plan staff worked hard to process Ashmore's application and comply with DOL deadlines. They tried to accommodate Ashmore by rescheduling the examinations, consolidating them in Atlanta, and then trying (unsuccessfully) to reschedule the examinations once again at his request. They also tried to address Ashmore's questions about plane seating, car service, and luggage handling by referring him to the Plan's travel policy and its travel agent. For all the Plan did, Ashmore remained defiant.

It is irrelevant that the Plan staff try to accommodate Players where possible; of course they do. It is irrelevant that Ashmore had a right to request accommodations; of course he did. But when Ashmore was told that the examinations would not be rescheduled further, he had to attend.

Ultimately, no lack of "accommodations" prevented Ashmore from attending the examinations. Ashmore said he would travel to Atlanta, and his other concerns about plane

[8] *See* Plan Doc. § 13.14 (053) ("If a claim for disability benefits is wholly or partially denied, the Disability Initial Claims Committee will give the claimant notice of its adverse determination within a reasonable time, but not later than 45 days after receipt of the claim."). *See also* Dept. of Labor Claims Procedure, 29 C.F.R. § 2560.503-1(f)(3) ("In the case of a claim for disability benefits, the plan administrator shall notify the claimant… of the plan's adverse benefit determination within a reasonable period of time, but not later than 45 days after receipt of the claim by the plan.").

seating, car service, and luggage were no concern at all (he would have known this had he consulted the travel policy or contacted the travel agent).

B. Plan staff did not sabotage Ashmore's application.

Ashmore's suggestion that Plan staff sabotaged his application or led him to believe that he should expect any particular outcome is baseless.[9] No one in the NFL Player Benefits Office had a reason to undermine Ashmore's application; they had no stake in it. Their job is to try to arrange neutral examinations and prepare application-related material for review by the Committee and the Board.[10]

No one in the NFL Player Benefits Office told Ashmore what the Committee or the Board might do in response to his so-called request for "accommodations." Plan staff had no idea, as shown by the extra-record evidence that Ashmore cites. A staff member speculated the Committee might tell Ashmore "you got to go" to the examinations,[11] and that would be that. The Committee's decision to follow the terms of the Plan and deny Ashmore's application for benefits instead demonstrates that the Committee independently reviewed the record and decided the application, just as Ashmore insists it should have.[12]

Ashmore is so desperate to shift blame that—after admitting that Plan staff "informed him the neuropsychologist could not break up the neuropsychological examination and, thus, the

[9] Pl.'s Mot. at 17 ("While Mr. Ashmore was extremely clear about his willingness to attend the examinations, the Plan Office was demonstrably less straightforward. The Plan Office led him to believe his requests were being reviewed by the Committee, when, in fact, it was laying the groundwork for a denial."); *id*. at 19 ("Clearly, Ms. Richard and the Plan Office misled Mr. Ashmore….").

[10] Pl.'s Mot. at 4, ¶ 13.

[11] Pl.'s Mot. at 18 (citing e-mail correspondence produced by the Plan in discovery, which shows Plan staff's internal speculation about what the Committee might do with Ashmore's application).

[12] Pl.'s Mot. at 19 ("The Committee had the opportunity to reach its own reasonable and informed decision when Mr. Ashmore's application was presented. Indeed, the Committee is ultimately responsible for reviewing and deciding all applications for T&P disability benefits and is expected to analyze all pertinent application-related material.").

three examinations remained as scheduled"[13]—he says that "[a]t no point was he informed that he was expected to attend the examinations as scheduled and with or without accommodations."[14] That is incredible. Ashmore knew he had to attend Plan neutral examinations. He knew that his application could be denied if he refused or failed to attend. He knew that Plan staff had (re)scheduled the neutral evaluations in Atlanta. He knew that those Atlanta examinations were going forward, despite his requests for "accommodations." He knew that he could travel to Atlanta. He knew that he never consulted the Plan's travel policy, contacted its travel agent, or made even the slightest attempt to attend the examinations as he was instructed. And he knew that, having chosen not to attend the Atlanta examinations, the Committee—not Plan staff—would decide the fate of his application.[15] In the face of all this, Ashmore's attempt to blame Plan staff falls flat. Is Ashmore truly that blind to his role and the consequences of his own actions?[16]

C. The Committee and the Board considered Ashmore's requests, saw them for what they were, and followed the terms of the Plan.

Ashmore's allegation that Plan staff "did not present [his] request for accommodations to

[13] Pl. Mot. at 6, ¶ 25.

[14] Pl.'s Mot. at 18.

[15] *See* 10/28/2015 E-Mail fr. E. Dabdoub to E. Richard (409) (requesting that the Committee review Ashmore's requests for "accommodations"); Pl.'s Mot. at 4, ¶ 13 (noting that "[t]he NFL Player Benefits Office ('Plan Office') gathers and prepares all pertinent application-related material for presentation" to the Committee and, ultimately, the Board").

[16] Ashmore also tries to impugn the motives of Plan staff by noting that they cancelled the Atlanta examinations. Pl.'s Mot. at 7, ¶ 30; *id*. at 18, n.8. That was the sensible thing to do after Ashmore said he would not attend the examinations. (Ashmore may not realize that the Plan's neutral physicians charge the Plan late-cancellation and no-show fees.) It is also irrelevant because, for all Ashmore knew, the examinations were set to go forward in Atlanta, and he had every opportunity to reverse his stance and attend them, or at least provide some sort of advance notice that he was unable to attend. Ashmore did not do so prior to the Committee's decision—which happened on November 2, 2015, and not October 29 as Ashmore believes. *Compare* 11/2/2015 E-Mail fr. C. Smith to S. Vincent, *et al*. (352- 54), *and* 11/2/2015 E-Mail fr. P. Reynolds to C. Smith, *et al*. (356), *with* Pl.'s Mot. at 18 (stating incorrectly that "Committee meeting minutes confirm that its decision… was made on October 29, 2015).

the Committee as he was led to believe"[17] is demonstrably false. The administrative record produced in this litigation makes it clear that the record presented to the Committee contained all of Ashmore's letters and his requests for "accommodations."[18] Likewise, the record presented to the Board contained all of the material timely submitted by Ashmore on appeal.[19] To this day, Ashmore has never identified a single request of his that was not presented to either the Committee or the Board.

Ashmore apparently assumes that his requests for "accommodations" were not presented because the Committee and the Board did not respond to them specifically. But the truth is, the Committee and the Board saw Ashmore's requests for what they were—pure obstructionism. Ashmore deliberately chose not to attend the scheduled examinations, and in doing so he failed to comply with Plan Section 3.2(c).

III. Even If The Court Finds In Favor Of Ashmore, Remand Is The Appropriate Remedy.

From the beginning, the Plan has conceded that the Committee and the Board did not consider the evidence Ashmore submitted because, regardless of what a Player submits, an application "will be denied" if a Player fails to attend a scheduled medical examination. Ashmore tries to transform this concession into an abuse of discretion or an abdication of fiduciary duties when it plainly was not, and he hopes the Court will in turn decide the merits of his application and award him T&P benefits despite his failure to comply with the terms of the

[17] Pl.'s Mot. at 18.

[18] The documents included in the record for the Committee are identified with an "E-Ballot – 10/29/2015" label. *See also* 10/29/2015 E-mail fr. P. Scott to A. Williams, *et al.* (349) (referring Committee's attention to multiple letters submitted by Mr. Dabdoub on behalf of Ashmore).

[19] The documents included in the record for the Board are identified with a "DBM – 8/17/2016" label.

Plan.[20] The Court should not do so.

Even if the Court were to find that the Board wrongly or unreasonably denied Ashmore's application, remand is the appropriate remedy.[21] Courts recognize that "the broad managerial discretion granted [to plan administrators] under the ERISA statutory provisions indicates a Congressional intent that they be primarily responsible for establishing and operating the claims procedures."[22] As a result, "there is a strong policy in favor of letting [the plan administrator] decide an employee's benefit eligibility. If the [administrator's] decisions could be challenged when incomplete, their ability to expertly and efficiently manage the fund would be undermined, and the burden of the federal courts increased due to frivolous suits[.]"[23] Remand would allow the Board to review the merits of Ashmore's application and decide, in the first instance, whether he is entitled to T&P benefits under the terms of the Plan, as ERISA intends.

Remand is particularly appropriate where a plan administrator does not consider specific

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[20] Ashmore also cites the Plan's admission that it "can approve applications for total and permanent disability benefits without conducting a medical evaluation." Pl.'s Mot. at 12, ¶ 54. The admission does not advance Ashmore's argument for two reasons. First, it ignores the mandatory nature of the Plan's failure-to-attend provision at Section 3.2(c). Second, the Plan admitted this because the Plan can approve a Player's application for T&P benefits without conducting a neutral evaluation if, for example, the Player is receiving Social Security disability benefits at the time of his application. *See* Plan Section 3.2(b) (011- 12). That was not the case with Ashmore.

[21] *See Till v. Lincoln Nat. Life Ins. Co.*, 182 F. Supp. 3d 1243, 1261 (M.D. Ala. 2016) ("When a court determines that a plan administrator has violated ERISA procedures, the usual remedy is to remand the case for a full and fair review.") (quoting *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993)), *aff'd* 678 Fed. App'x 805 (11th Cir. 2017); *Hamilton v. Mecca, Inc.*, 930 F. Supp. 1540, 1552 (S.D. Ga. 1996) ("The usual procedure for a plan's breach of duty under § 1133 is remand to the plan administrator."). *See also Elliott v. Metro. Life Ins. Co.*, 473 F.3d 613, 622 (6th Cir. 2006) (quoting *Buffonge v. Prudential Ins. Co. of Am.*, 426 F.3d 20, 31 (1st Cir. 2005)) ("[W]here the 'problem is with the integrity of [the plan's] decision-making process,' rather than 'that [a claimant] was denied benefits to which he was clearly entitled,' the appropriate remedy generally is remand to the plan administrator.").

[22] *Taylor v. Bakery and Confectionary Union and Indus. Int'l Welfare Fund*, 455 F. Supp. 816, 820 (E.D.N.C. 1978).

[23] *Id. See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (noting that plan administrators should be permitted to exercise their discretionary authority because it "promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation"); *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1332 (S.D. Fla. 2002) ("ERISA strongly favors administrative resolution and the construction of a factual record prior to an action being filed in federal court.").

records or information on which a claim for benefits is based.[24] That is indisputably the case here. The Committee and the Board did not consider the medical evidence that Ashmore did submit, and in this litigation he would like the Court to consider additional evidence that was never before the Board.[25] Most importantly, Ashmore's failure to attend the required neutral examinations deprived the Board of evidence that it was entitled to obtain and review prior to deciding Ashmore's application for benefits. Remand would cure all of these problems, and hold Ashmore to his stated commitment to attend the required Plan neutral examinations.

CONCLUSION

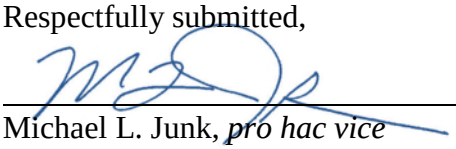
The Court should deny Ashmore's motion and grant judgment in favor of the Plan. Short of that, the Court should remand this matter to the Board.

[24] *See Olds v. Ret. Plan of Int'l Paper Co.*, 782 F. Supp. 2d 1297, 1303 (S.D. Ala. 2011) (finding remand appropriate where defendant upheld a denial of benefits without taking into account comments and records that confirmed the existence of the condition upon which the plaintiff's claim for disability benefits was based).

[25] *See* Ans. ¶ 35 ("Defendant admits that Plaintiff's application for disability benefits was denied for failure to attend required medical examinations, and therefore the Plan administrator did not review or resolve the medical evidence submitted in support of Plaintiff's application."); Pl.'s Mot. at 11, ¶¶ 48 n.4, 49 n.5 (referring the Court to additional medical records that were not part of the record provided to the Board). The Plan will move the Court to strike this evidence because it was not part of the administrative record before the Board. *See* ***Blankenship***, 644 F.3d at 1354 ("Review of the plan administrator's denial of benefits is limited to consideration of the material available to the administrator at the time it made its decision.").

Dated: November 13, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2017, a true and correct copy of the foregoing Memorandum in Opposition to Plaintiff's Motion for Summary Judgment was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following counsel for Plaintiff:

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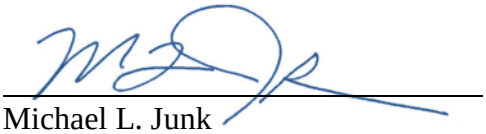

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